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FCC Mailroom

June 3, 2016

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
455 12th Street, SW  
Washington, D.C. 20554

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RE: Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42  
Commercial Availability of Navigation Devices, CS Docket No. 97-80  
Comment of the Undersigned Attorneys General

Dear Secretary Dortch:

We, the undersigned Attorneys General ("States"), submit this comment to the Federal Communications Commission ("FCC") in response to its proposed set-top box rulemaking. The proposed rule provides consumers with greater choice in how they access multichannel video programming to which they subscribe, and allows "consumer electronics manufacturers, innovators, and other developers to build devices or software solutions that can navigate the universe of multichannel video programming with a competitive user interface."<sup>1</sup> This comment affirms that state consumer protection laws apply to competitive device manufacturers, and answers questions set forth in Paragraph 78 of the Notice of Proposed Rulemaking and Memorandum Opinion and Order (FCC 16-18) ("NPRM").

In brief, we urge the FCC to require manufacturers of third-party set-top boxes to publish consumer-facing statements of compliance with the privacy obligations that apply to multichannel video programming distributors ("MVPDs"). This approach is consistent with the Federal Trade Commission's ("FTC") recent recommendation, and would enhance enforcement of any potential privacy violations as violations of our state consumer protection statutes (Unfair, Deceptive or Abusive Acts and Practices, or "UDAP," laws). Furthermore, consumer electronics manufacturers, innovators, and developers must also comply with state privacy laws, including those that regulate information practices and data security.

*Summary of FCC's Certification Framework and FTC's Recommendation*

<sup>1</sup> Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, 81 Fed Reg. 14033 (March 16, 2016) at 14033 [Summary].

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In its NPRM, the FCC proposes that competitive device manufacturers should “certify” to MVPDs that their devices comply with the same consumer protection requirements that apply to MVPD-provided set-top boxes as a condition to providing television subscription information.<sup>2</sup> This would mean that consumer electronics manufacturers, innovators, and other developers would have to certify that their devices or software solutions protect consumers’ privacy to the same extent as federal law requires of cable and satellite service providers.<sup>3</sup>

In an April 22, 2016 comment to the FCC, the FTC suggests an additional requirement: MVPDs should only provide access to third-party set-top boxes that have provided *consumer-facing* statements promising to comply with the privacy obligations that apply to MVPDs.<sup>4</sup> The FTC also recommends that third-party set-top boxes make “short, easy-to-understand, and just-in-time disclosures... [that] could include a set-top box privacy ‘pledge’ that would appear on the product package, the product specification page, and/or other prominent locations.”<sup>5</sup> These public promises would then be enforceable under the FTC’s Section 5 authority if set-top box manufacturers’ business practices were inconsistent with any material obligations of the pledge.<sup>6</sup>

#### *State UDAP and Privacy Laws*

The State Attorneys General, as the chief consumer protection officials in our respective states, play an important role in enforcing state laws that protect consumer personal information. Our UDAP laws broadly prohibit unfair and deceptive acts and practices involving the collection, use or disclosure of consumers’ personal information.<sup>7</sup> They provide for injunctive relief, civil penalties, and when appropriate, restitution.<sup>8</sup> Civil penalties can be awarded up to \$50,000 per violation depending on the conduct and the UDAP statute.<sup>9</sup> Additionally, some UDAP statutes provide for a private cause of action.<sup>10</sup>

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<sup>2</sup> *Id.* at 14045, 14051 (proposing Section 76.1200(l)).

<sup>3</sup> *See* 47 U.S.C. §§ 551, 338(i).

<sup>4</sup> Letter from Jessica Rich, Director of Bureau of Consumer Protection, Federal Trade Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 6 (April 22, 2016).

<sup>5</sup> *Id.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *See e.g.* Cal. Bus. & Prof. Code §§ 17200; Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-11a, *et seq.*; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*; NY General Business Law §§ 349, 350.

<sup>8</sup> Cal. Bus. & Prof. Code §§ 17203, 17205-17207; Conn. Gen. Stat. § 42-110m

<sup>9</sup> *See e.g.* Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*; New York General Business Law § 350(d); Cal. Bus. & Prof. Code §§ 17203, 17205-17207; Conn. Gen. Stat. § 42-110o.

<sup>10</sup> Cal. Bus. & Prof. Code §§ 17203, 17204.

Accordingly, consistent with the FTC's recommendation, the States recommend that MVPDs should provide access only to third-party set-top boxes that have provided consumer-facing privacy statements. Requiring consumer-facing statements would enhance the States' abilities to pursue consumer protection actions against third-party set-top box manufacturers. The States' UDAP laws would apply to any public representations about their business practices, including both the certification and any consumer-facing statements about consumer privacy.

Paragraph 78 of the NPRM sought comment on the extent to which Internet-connected competitive device manufacturers must and should continue to comply with state privacy statutes. For example, and as noted in paragraph 78, the California Online Privacy Protection Act ("CalOPPA")<sup>11</sup> mandates online services that collect personally identifiable information, whether through a website, mobile application, or other Internet-connected device, to say what they do and do what they say. Operators of these online services must conspicuously post a privacy policy setting forth specific disclosures about their privacy practices and comply with the terms of the policy.<sup>12</sup> Accordingly, this statute would apply to competitive device manufacturers to the extent that they use the Internet to provide programming, scheduling, and recording information to consumers and collect personally identifiable information about them. CalOPPA does not require online services to provide specific consumer privacy protections as those set forth in Section 631 and 338 of the Communications Act of 1934. However, it would be a violation of CalOPPA for an online service, including qualifying third-party set-top boxes, to not have a privacy policy and not comply with the representations in that privacy policy, including any consumer-facing certification required by the FCC. Competitive device manufacturers must also abide by other state statutes relating to information practices and data security.<sup>13</sup>

Lastly, the proposed rule and the NPRM do not address the fact that States complement and supplement enforcement by federal entities, including the FTC and FCC. State UDAP laws, as well as any future legislation that the States may pass to regulate the online ecosystem, provide concurrent and, sometimes, even greater privacy protection. As a result, it is critical that any FCC action in this evolving area have no preemptive effect on the States and that the States retain continued jurisdiction to enforce our respective laws.

Thank you for the opportunity to provide this comment with regard to the FCC's proposed set-top box rulemaking. As chief consumer protection officials, we urge the FCC—

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<sup>11</sup> Cal. Bus. & Prof. Code §§ 22575-22579.

<sup>12</sup> A violation of CalOPPA may be alleged as a predicate violation under the "unlawful" prong of California's UDAP Statute, *supra* footnote 6.

<sup>13</sup> See e.g. Cal. Civil Code § 1798.81 [disposal of customer records], § 1798.81.5 [reasonable data security], Cal. Civ. Code § 1799.3 [prohibition on disclosing video recording sales or rental information]; § 1798.83 [Shine the Light Act]; Connecticut General Statutes § 42-471 [Safeguarding of Personal Information]; Personal Information Protection Act, 815 ILCS 530/1, *et seq.* (amended 2016, Pub. L. 099-0503. Effective 1/1/2017); Massachusetts Data Security Regulations, 201 C.M.R. 17.00 *et seq.*; Maryland Personal Information Protection Act, Md. Code Ann., Com. Law § 14-3501, *et seq.*; Miss. Code Ann. § 75-24-29; Oregon Consumer Identity Theft Protection Act, ORS 646A.600 *et seq.*; Vermont Security Breach Notice Act, 9 V.S.A. § 2430, 35.

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should it proceed with the proposed set-top box rule—to mandate that MVPDs provide data access only to third-party set-top box manufacturers that not only comply with the privacy statutes that apply to cable and satellite companies, but have made public promises about these certifications to consumers. This mandate will allow State Attorneys General to provide an effective enforcement backstop.

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Very truly yours,



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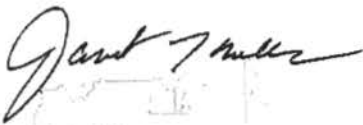
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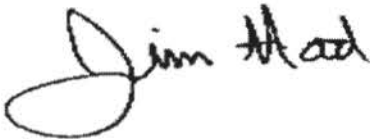
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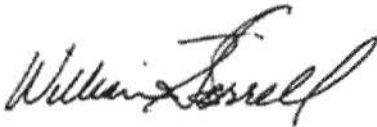
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